



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

CRS
Docket No: 4764-01
22 July 2002

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Marine Corps, applied to this Board requesting, in effect, that his naval record be corrected by restoring him to the rank of sergeant (SGT; E-5).

2. The Board, consisting of Messrs. Kastner, Shy, and Brezna, reviewed Petitioner's allegations of error and injustice on 19 June 2002 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. On 12 July 1995 Petitioner enlisted in the Marine Corps Reserve and on 29 May 1998 enlisted in the Regular Marine Corps. The record reflects that until the incident at issue, Petitioner served well and without disciplinary infractions and was advanced in rank to SGT.

d. Petitioner participated in a hazing incident on 5 April 2000. The incident involved splitting the company into two groups, one called the "old" Marines and the other called the "new" Marines. Petitioner was part of the "old" Marines who organized this "welcome aboard" hazing ritual. Basically, the

"new" Marines would be directed into a room one by one, told to stand in front of a desk, and then grabbed from behind by an "old" Marine who would be joined by the others in wrestling the "new" Marine to the floor. The time was controlled by Petitioner and two other SGTs to last between 30 seconds to two minutes. This incident was called a "chaplain session." One of the "new" Marines complained about the incident.

e. On 9 May 2000 a formal command investigation was conducted into the incident of 5 April 2000. The investigation found that a formation had been called by Staff Sergeant (SSGT; E-6) M for the purpose of accountability and the presentation of a plaque. He departed immediately after the formation with SSGT J. A question was asked after the formation by someone about a "chaplain session." As a result of the question, the platoon was formed into two groups, one of "new" Marines and the other of "old" Marines. The hazing was stopped when SSGTs M and J learned that it was going on. However, the two SSGTs stated afterwards that they did not consider it hazing. The investigation also cited Marine Corps Order (MCO) 1700.28, of 18 June 1997, that prohibited events such as the one occurring on 5 April 2000, and classified such events as hazing.

f. One of the "old" Marines made a statement that implicated the company commander, Captain (CAPT; O-3) O. The Marine stated that on different occasions that CAPT O had asked him when the new Marines were "going to see the chaplain." The implication was that CAPT O knew what a "chaplain session" was. Later, the same Marine acknowledged that he could not specifically say that CAPT O knew that a "chaplain session" was a formalized welcome aboard for the "new" Marines. The command investigation found that none of the Marines said that this welcome aboard was called a "chaplain session." In another interview, the same "old" Marine said that he felt there was a linkage between CAPT O inquiring about the new Marines going to see the chaplain and the "chaplain session." The "old" Marine also stated that it was a spontaneous event.

g. CAPT O recalled the conversation with the "old" Marine but stated that there was no double meaning when he inquired about the Marines visiting the chaplain. He admitted that he had witnessed occasional wrestling among his Marines, but viewed it as part of the whole platoon's interest in professional wrestling. During the command investigation, Gunnery Sergeant (GYSGT; E-7) F was interviewed, but could not recall any officer or senior enlisted individual using the term "going to see the chaplain" in the context of a wrestling match or a welcome aboard for "new" Marines.

h. The investigation concluded that the wrestling witnessed by the officers and senior enlisted members of the platoon was universally viewed as good-natured horseplay until it was

witnessed and stopped by SSGTs M and J on 5 April 2000. However, before that date, the wrestling had taken place in public and not in a closed room. In the opinion of the investigator, the "old" Marine's accusation that CAPT O knew what was going on was found to be an assumption. Further, the investigation found it was not reasonable for the Marines to assume that the officers would know what a "chaplain session" was prior to 5 April 2000.

i. The command investigation recommended that CAPT O be the subject of a non-punitive letter of caution since he knew or reasonably should have known that the public horseplay occurring in his platoon could develop into hazing. It was also recommended that the Petitioner receive a non-punitive letter of caution for "initiating, encouraging and recklessly permitting this hazing to occur." Letters of caution were also recommended for the two SSGTs.

j. On 12 May 2000 the commanding officer imposed nonjudicial punishment (NJP) on Petitioner for failure to obey MCO 1700.28 pertaining to hazing. The punishment imposed consisted of a reduction in rank from SGT to corporal (CPL; E-4). There is no evidence that the NJP was appealed. Further, there is no Offenses and Punishment page in Petitioner's record documenting the NJP. The only documentation in the record at this time is the Commandant Directed (DC) fitness report for the period 5-12 May 2000, which was prepared "because (Petitioner) received NJP."

k. In his application, Petitioner contends that although three Marines received NJP for the incident at issue, one of these Marines was not reduced in rank. He contends that this outcome was unfair.

l. An advisory opinion from the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps (CMC), dated 1 August 2001, recommended that relief be denied. In this regard, the SJA notes that in the situation at issue, the misconduct of other Marines does not "absolve Petitioner from his own misconduct." Moreover, disparate treatment only provides grounds for relief if certain factors exist: the cases are factually indistinguishable; the treatment of co-accused is widely dissimilar; and the dissimilarity resulted from an improper motive on the part of the authority that jointly disposed of the offenses. None of these factors were present in this case. By Petitioner's own admission, the only sergeant involved in the misconduct who did not receive a reduction had only been recently promoted to the rank of SGT, and Petitioner had been a sergeant for over 18 months. Lastly, the opinion noted that Petitioner did not allege an impermissible motive for the differences in punishment.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that not only should the record be corrected to show that Petitioner was not reduced from SGT to CPL, the NJP should be removed from the record altogether. In this regard, the Board agrees with Petitioner that this is a case about unjustly disparate treatment, but not the sort of disparate treatment that he alleges or that the SJA to CMC addresses in the advisory opinion.

Simply put, the Board believes CAPT O either knew about the "chaplain sessions," or took great pains to be unaware of this minor hazing. Accordingly, the Board holds him primarily responsible for the incident. It also does not appear from the record that any serious adverse action was taken against him. Even if he received a letter of caution, it is certainly unfair that Petitioner received NJP and a reduction in rank for actions that were, at least implicitly, authorized or tolerated by the command.

In addition, the Board notes that the hazing at issue was relatively minor in nature. There clearly was no intent to injure any of the "new" Marines, and none of these Marines were, in fact, hurt. The Board notes that the investigating officer, a Marine captain, concluded that the interest of discipline could be adequately vindicated by the issuance of letters of caution to all concerned. This recommendation seems to the Board to have been a "good call." This is especially true in Petitioner's case, given the fact that he had no prior disciplinary actions and his record of good performance.

Accordingly, the Board believes that the NJP, and all related documentation, should be removed from Petitioner's record.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references to the NJP of 12 May 2000, including but not limited to any entry on an Offenses and Punishments page (page 12) in his field records.

b. That the record be further corrected to show that Petitioner was never reduced in rank from SGT to CPL.

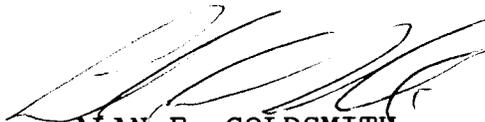
c. That the record be further corrected by removing the "DC" fitness report for the period 5 to 12 May 2000.

d. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

e. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and approved:

SEP 10 2002



Joseph G. Lynch
Assistant General Counsel
(Manpower and Reserve Affairs)